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In The

Supreme Court of the United States

October Term, A.D. 1970

No. 1198

LAWRENCE LEVIT and HUGH H. HATCHETT,

Petitioners,

vs.

LEO J. POWERS, JOHN P. CONNELAN, and THE CHICAGO LAW INSTITUTE,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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The Appellate Court erred in failing to pass on the three questions under the Constitution of the United States and of this State that were raised in and passed on adversely to petitioner and the other members of The Chicago Law Institute in the trial court, because they are determinative of this case, and in failing in its duty to do so, the Appellate Court has deprived the appellants and all the members of The Chicago Law Institute of their procedural rights without due process of law, and has denied them the protection and equal protection of the laws, in violation of their rights under the 14th Amendment, Section 1, to the Constitution of the United States, and the Supreme Court of Illinois erred in holding by denying the Petition for Appeal as a Matter of Right that it did not 23

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Lawrence Lesit and Hugh M. Matchett, the petitioners herein, pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this case denying their petition for appeal as a matter of right from a judgment of the Illinois Appellate Court, First District, Third Division, affirming a judgment of the Circuit Court of Cook County, Illinois, denying and dismissing petitioner Lesit's petition for a writ of mandamus to compel the respondents to hold the first annual meeting of the members of The Chicago Law Institute to be held since 1965, pursuant to the call of its By-Laws.

OPINIONS BELOW.

The Judgment of the Circuit Court of Cook County, Illinois, is unreported but it is printed in the Appendix hereto, infra, page 1a. The Transfer Order of the Supreme Court of Illinois transferring a direct appeal taken to that Court to the Illinois Appellate Court, First District, is unreported but it is printed in the Appendix hereto, infra, page 2a.

The opinion of the Illinois Appellate Court, First District, Third Division, is reported as 120 Ill. App. 2d 411, 257 N.E. 2d 142, and it is printed in the Appendix hereto, infra, pages 5a to 19a. The Judgment of the Supreme Court of Illinois is unreported but it is printed in the Appendix hereto, infra, page 19a.

JURISDICTION.

The Judgment of the Supreme Court of Illinois was entered October 5th, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

FEDERAL QUESTION.

Whether the denial of a petition for a writ of mandamus to compel the officers of and a private domestic corporation to hold the annual meeting of the members

of the corporation pursuant to the call of its by-laws, to enable its members to make an assessment and to elect officers and managers, the petitioners admittedly having a clear legal right to the writ, and there being no other legal remedy available, puts the petitioners out of the protection of the law, and is a denial of the protection and equal protection of the laws, and a deprivation of property without due process of law, by the State of Illinois, in violation of the 14th Amendment, Section 1, to the Constitution of the United States.

THE FEDERAL AND STATE CONSTITUTIONAL PROVISIONS, STATE STATUTES, AND STATE RULES INVOLVED IN THIS CASE.

This case involves the 14th Amendment, Section 1, to the Constitution of the United States, and, indirectly, by reason of that fact, Article II, Section 10, of, and the Sixth Amendment to, that constitution.

Procedurally, this case involves the judicial procedure established by Article VI, Sections 5, 7, and 9 of the Constitution of 1870 of the State of Illinois, and Chapter 37, Section 35, and Chapter 87, Sections 8, 9, 10, and 11, of the Illinois Revised Statutes 1969, and Supreme Court of Illinois Rules of Civil Procedure 301, 302(d), 315(a), 316, and 317.

The Federal Constitutional provisions are set out in the Appendix, infra, page 20a; and the State Constitutional provisions, and Statutes, and Rules, are all set out in the Appendix, supra, pages 20a to 24a, with appropriate volume and page references to the Illinois Revised Statutes 1969, from which they are taken.

STATEMENT OF THE CASE.

The Chicago Law Institute is a corporation created by a special act of the Illinois State Legislature on February 18th, 1857 (Private Laws of Illinois 1857, page 1186). It operated a law library for the benefit of its members continuously for over 110 years.

It did not hold an annual meeting in 1966 and 1967 and 1968 and 1969 and 1970. The annual meeting of 1971 is called by the By-Laws to be held on Friday, January 29th, 1971, at 3:00 P.M.

Petitioners are, and for many years have been, members and shareholders in good standing and entitled to vote and to hold office in The Chicago Law Institute.

The Charter of The Chicago Law Institute provides that:

> "The officers of said corporation shall consist of a president * * * secretary * * * and they shall respectively hold and remain in office for the space of one year and until others are elected in their stead." (Charter, Section 4.)
>
> "By-Laws * * * may be adopted by said corporation." (Charter, Section 5.)

The By-Laws of The Chicago Law Institute provide:

> "The officers of the Institute shall be a President * * * Secretary * * *; and there shall be nine managers. The officers and managers shall be elected at the annual meeting of the Institute, and shall hold their respective offices for one year, and until their successors are elected." (Section 3.)
>
> "There shall be an annual meeting of the Institute for the election of officers and managers, and

the transaction of such other business as shall come before it, on the last Friday in the month of January each year at 3:00 o'clock in the Institute rooms, unless otherwise ordered by the Executive Committee." "There may be special meetings * * * on written request of twenty members directed to the President stating the purpose of such meeting." "Notice of all meetings of the Institute, whether annual or special, shall be given by the Secretary to each member by mailing same in the Chicago Postoffice at least five days prior to such meeting, however, ten days notice shall be given of all special meetings called for the purpose of levying a special assessment or altering or amending the By-Laws as the case may be and notice of each special meeting shall state the purpose or purposes thereof. These By-Laws may be altered or amended or added to at the annual meeting without notice of such proposed change: or at any special meeting called for such purpose." (Section 12.)

"At the annual meeting there shall be levied and thereafter collected an annual *assessment*, in such amount as shall then be determined, from each member whose membership is fully or partially paid prior to the current calendar year." (Section 13.)

"There shall be an Executive Committee of the Institute composed of the officers and managers. * * * Such of these By-Laws as appertain to the use of the library are subject to change by the Executive Committee, and the Committee may make any additional rules and regulations, and change or repeal any such By-Laws." (Section 4.)

At the annual meeting of the members of The Chicago Law Institute on January 25th, 1965, respondents Leo J. Powers and John P. Coghlan were elected President and Secretary of the Institute, and other officers and nine managers were elected at that time. All except John

P. Coghlan, who has died, are remaining in office until others are elected in their stead. (Under Illinois law a mandamus action does not abate against a deceased person. See statute set out in Appendix, infra, page 22a.)

On December 6th, 1965, the President in the name of The Chicago Law Institute, on directions of the majority of the managers, entered into an agreement with the County of Cook, not approved by the membership of The Chicago Law Institute, and against their overwhelming vote against the proposition in a special meeting held June 18th, 1965, called to approve or disapprove it, which provided that The Chicago Law Institute's Law Library and other assets be turned over to The County of Cook on the application of the cy pres doctrine. On December 10th, 1965, they caused a suit in chancery entitled "Chicago Law Institute, et al, v. County of Cook, etc.; et al", Circuit Court of Cook County Case No. 65 CH 6863, to be filed for judicial approval of the agreement.

On March 18th, 1966, petitioner Lenit addressed a demand upon the acting officers and managers of The Chicago Law Institute, jointly and severally, to call an annual meeting of the members of The Chicago Law Institute. It was ignored.

Petitioner Lenit filed this suit for a writ of mandamus on April 14th, 1966. On July 8th, 1966, he filed his first amended petition for a writ of mandamus.

On July 13th, 1966, the Honorable Donald J. O'Brien, one of the Judges of the Circuit Court of Cook County, entered a final decree in Case No. 65 CH 6863 approving the agreement dated December 6th, 1965, and directing

The County of Cook and The Chicago Law Institute to take all steps desirable or necessary to carry it into effect.

The respondents made a motion to dismiss the amended petition on July 25th, 1966, on the ground that no meeting should be held pending disposition of the appeal in Case No. 65 CH 6863, so that petitioner would not "interfere with the jurisdiction of the Appellate Court, First District."

On October 3rd, 1966, petitioner Matchett was permitted to file his appearance as additional counsel for Mr. Lenit. On December 20th, 1966, the respondents filed an amended motion to dismiss the amended petition advising the court that on December 14th, 1966, the last appeal had been dismissed and a petition for leave to appeal had been denied and all other appeals had previously been dismissed. It stated that the respondents intended "to call a meeting of The Chicago Law Institute at the earliest practicable time and then and there report to the membership, file a current account, and call for the election of officers." On January 12th, 1967, the court granted the motion and dismissed the first amended petition for a writ of mandamus.

On February 10th, 1967, the petitioner Lenit filed a motion to vacate the judgment of January 12th, 1967, and for leave to amend the amended petition, and for issuance of a writ of mandamus. On February 12th, 1967, the court granted that portion of the motion to vacate asking the court to vacate the judgment of January 12th, 1967.

Petitioner Lenit filed a second amended petition on February 21st, 1967, for a writ of mandamus. On March 1st, 1967, the respondents filed an answer. On August

9th, 1967, petitioner Lenit filed a motion for summary judgment.

Petitioner Lenit contended, and petitioners contend, that the petitioners' right to mandamus is absolute under the circumstances stated and that the dismissal of the petition for a writ of mandamus by the Illinois courts would deprive petitioner Lenit and each member of The Chicago Law Institute of his property in violation of his Federal rights under the 14th Amendment, Section 1, in depriving him of his property without due process of law, and in denying him the protection and equal protection of the laws of the State of Illinois (Second Amended Petition, Paragraph 8). The respondents answered: "Defendants deny the allegations of Paragraph 8. Further answering, Defendants state that the issuance of the extraordinary Writ of Mandamus is obviously discretionary and is not a remedy of right to which Petitioner Lenit is entitled." (Answer, Paragraph 8); and "Defendants aver that there has been no conceivable deprivation of property of Petitioner Lawrence Lenit. The members of a charitable organization have no beneficial interest in a claim to the property of the organization. Accordingly, neither the Petitioner nor any other member of The Chicago Law Institute has any proprietary, pecuniary, or other beneficial interest in or claim to the property or assets of the organization. There cannot have been any deprivation of an interest where the interest itself is non-existent." (Answer, Separate Defenses, Paragraph 2); and "Defendants aver that Petitioner Lawrence Lenit has failed to show any circumstances or conditions to justify issuance of the Writ of Mandamus. This Writ is an extraordinary remedy. It is not a writ of right, but one which issues in the dis-

cretion of the Court. * * * Defendants anticipate that the question of further adjournment of the date of The Chicago Law Institute annual meeting is imminently to become moot, pending disposition of the last remaining appeal from the Final Decree in Case No. 65 CH 6863. Not only is there no necessity for the extraordinary remedy of mandamus in this case, but, on the contrary, a writ of mandamus would not serve any good or useful purpose. Accordingly, there is no occasion for exercise of the Court's discretion in allowing the Writ to issue." (Answer, Special Defenses, Paragraph 3.)

On Petitioner Lenit's motion for summary judgment he again joined issue with the respondents on the question of his constitutional right to remedy by stating "it being apparent" "that the officers and managers have deprived and are depriving the plaintiffs and other members of their property right to hold an annual meeting and to elect their Officers and managers and to protect their interest in the corporation and to protect their right to their proportionate share of its assets in the event of dissolution, and the issuance of a writ of mandamus is necessarily under the circumstances to preserve the corporation and the plaintiff's and other members'/ property interests therein, and refusal to issue the writ of mandamus would be for the State of Illinois to deprive plaintiff and the other members of their property without due process of law in violation of * * * the 14th Amendment, Section 1, of the Constitution of the United States." (Motion For Summary Judgment.)

On August 16th, 1967, the Court entered judgment for the respondents. The Judgment states:

> "This matter comes up for hearing on the Second Amended Petition For Writ Of Mandamus and the

Answer To Second Amended Petition, and on Petitioner's Motion For Summary Judgment. • • • The Court has considered each of the questions raised by petitioner arising under the Constitution of the United States and of this State and holds each of them to be without merit. • • • Petitioner's Motion for Summary Judgment • • • is, denied: • • • Petitioner's Second Amended Petition For Writ of Mandamus • • • is, denied. • • • The Second Amended Petition For Writ Of Mandamus is dismissed." "The Defendants' Request For Relief In Their Answer To Second Amended Petition that the Court dismiss the Second Amended Complain For Mandamus and assess Defendants' costs herein against Petitioner Lawrence Lenit • • • is, allowed. • • • Judgment is given Defendants and they shall receive Their costs." (Judgment.)

The trial court expressly found "that the right of the members of The Chicago Law Institute to hold an annual meeting has become abstract in that the corporation is in effect dissolved and has no assets and a meeting would serve no useful purpose."

Petitioner Lenit filed his notice of appeal to the Supreme Court of Illinois on September 14th, 1967. He filed an amendment to his notice of appeal on September 16th, 1967. Petitioner Matchett filed his notice of appeal to the Supreme Court of Illinois on September 14th, 1967.

Mr. Lenit, in his Amendment To Notice Of Appeal, prayed that the Court will hold that each of the questions raised by him under the Constitution of the United States and of this state is well taken. (Amendment To Notice Of Appeal, R. C367.) Mr. Matchett in his Notice

of Appeal stated: "He prays that the Court will hold that each of the questions raised by the Petitioner under the constitution of the United States and of this State is well taken." (Notice of Appeal)

The appellants set forth three specific questions in their brief in the Appellate Court arising under the 14th Amendment, Section 1, of the Constitution of the United States, that were raised in and passed on adversely to petitioner and the other members of The Chicago Law Institute in the trial court, an affirmative answer to all three of which would require reversal of the judgment appealed from, at pages 3 and 4 of their brief, but the Appellate Court saw fit to ignore them in its opinion.

The first question is:

> Whether the right of the members to hold an annual meeting, and the right of the members to vote, (and the interest they have in the assets of the corporation), are *property* within the meaning of that word as used in Article II, Section 2, and Article II, Section 19, of the Constitution of the State of Illinois, and the 14th Amendment, Section 1, to the Constitution of the United States.

Assuming an affirmative answer to the first question, the second question is:

> Whether the members of the corporation have sustained *injuries and wrongs* to said property within the meaning of those words as used in Article II, Section 19, of the Constitution of the State of Illinois, by the failure of the defendants to give notice of the annual meeting for 1966 and 1967 [and, of course, 1968 and 1969 and 1970 to date], without which they could not be held, for which the mem-

bers *ought* to have a *certain remedy* under said Article II, Section 19, and, if so, whether mandamus is the certain remedy to which they are entitled?

Assuming an affirmative answer to the first two questions, the third question is:

> Whether the members of the corporation have been *deprived* of said property and a certain remedy without due process of law, and denied the equal protection of the laws, by the State of Illinois, by the action of the trial court in denying their motion for summary judgment and their petition for a writ of mandamus and in dismissing their petition, in violation of Article II, Section 2, of the Constitution of the State of Illinois, and of the 14th Amendment, Section 1, to the Constitution of the United States.

The case involving questions arising under the Constitution of the United States and of the State of Illinois this appeal properly lay direct to the Supreme Court of Illinois.

On March 11th, 1968, the Supreme Court of Illinois transferred the case to the Illinois Appellate Court, First District. It said:

> "In this appeal from the order denying issuance of a writ of mandamus appellant states that the ultimate issue is whether an appeal pending before the Supreme Court of the United States involving the same subject matter is a defense in this case. Such allegation does not constitute a substantial constitutional question and, on the Court's own motion, this cause is transferred to the Appellate Court for the First District."
>
> "T/he Court • • • is of the opinion, finds and adjudges that this Court has no jurisdiction on direct appeal in this case."

The case was assigned to the Third Division.

The last remaining appeal from the final decree in Case No. 65 CH 6863, was pending in this Court when the briefs were filed in the Supreme Court of Illinois. After the case was transferred to the Appellate Court this Court on March 11th, 1968, in a per curiam decision, dismissed the appeal before it for want of jurisdiction and then, treating the papers for appeal as a petition for a writ of certiorari, denied certiorari. *Hettleman* v. *Chicago Law Institute*, 1968, 390 U.S. 338, rehearing denied 390 U.S. 1036.

On July 11th, 1968, two members of the Institute, Hettleman and Edmunds, filed a petition to vacate the decree in the chancery action as null and void. The petition was denied August 9th, 1968, and a motion to vacate that order was denied August 19th, 1968. A direct appeal was taken to the Supreme Court of Illinois from the denials of the motion to vacate but was transferred to the Illinois Appellate Court, First District, where it is pending now.

On July 17th, 1969, the Appellate Court affirmed the judgment. It committed three errors, two of them giving rise to questions arising under the Constitution of the United States and under the Constitution of the State of Illinois for the first time in and as a result of the action of the Appellate Court. The first error was its failure to pass on the three questions under the Constitution of the United States that were raised in and passed on adversely to petitioner and the other members of The Chicago Law Institute in the trial court and argued in the appellants' brief in that Court hereinafter stated in the Argument. Petitioner Matchett

raised the issue in his Petition For Rehearing that: "It is the duty of this Court [the Appellate Court] to decide each of those questions, and in failing to do so, this Court [the Appellate Court] has deprived the appellants and all of the members of The Chicago Law Institute of their procedural rights without due process of law, and has denied them the protection and equal protection of the laws, in violation of their rights under the Federal and State constitutional provisions aforesaid [the 14th Amendment, Section 1, to the Constitution of the United States]." (Petition For Rehearing, pp. 2-3.)

The second error was its holding that: "The weight of authority holds that, even where a clear legal right to the writ is shown, the Court, in view of the consequences attendant to its issuance may still deny it." Petitioner Matchett raised the issue in his Petition For Rehearing that a new constitutional question had arisen: "Whether a rule that mandamus is a discretionary writ where the petitioner has a clear legal right to a writ of mandamus and there is no other legal remedy when applied to deny the writ is a denial of a remedy for an injury and wrong, a denial of the protection and equal protection of the laws, and a deprivation of property without due process of law, in violation of the 14th Amendment, Section 1, of the Constitution of the United States, and Article II, Sections 2 and 19, of the Constitution of the State of Illinois." (Petition For Rehearing, pp. 7-8.)

The petitioner Matchett filed a petition for rehearing on September 30th, 1970, which included a petition for a certificate of importance which, if it had been granted, would have sent the case to the Supreme Court of Illinois for review under Illinois law. He pointed out the errors.

The petitioner Lenit filed a petition for rehearing and joined in the contention that these constitutional objections to the action of the Appellate Court were well taken. (Petition For Rehearing, p. 15.)

On April 2nd, 1970, the Appellate Court denied the petitions for rehearing. Both petitions for a certificate of importance were denied.

Lawrence Lenit, petitioner-appellant, and Hugh M. Matchett, aggrieved person-appellant, appealed as a matter of right under Article VI, Section 5, of the Constitution of Illinois, and pursuant to Rule 317 petitioned for appeal as a matter of right and, in the alternative, for leave to appeal, from the judgment of the Illinois Appellate Court, First District, Third Division, which became final on April 2nd, 1970, on denial of the timely petitions for rehearing.

The appeal lay as a matter of right because the Constitution of Illinois provides:

> "Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right only (a) in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court." (Article VI, Section 5.)

and the first two questions relied on for reversal of the Appellate Court are substantial questions arising under the Constitution of the United States and of this State that arose for the first time in and as a result of the action of the Appellate Court, and prayed, in the alternative, that leave to appeal should be granted, because the case involves two questions of such importance that they should be decided by the Supreme Court of Illinois.

On October 9th, 1970, the Supreme Court of Illinois denied the petition for appeal as a matter of right, and the alternative petitions for leave to appeal as a matter of discretion, and on November 12th, 1970, denied a motion to clarify its order by stating whether it had or had not passed on the merits of the constitutional questions that arose in the Appellate Court for the first time as a result of the action of that court. The right to appeal, however, being a matter of right, the Supreme Court of Illinois necessarily passed on the questions raised and found them to be without merit because in the Federal system a summary disposition of an appeal by affirmance or by a dismissal for want of a substantial federal question by this Court is a disposition on the merits (*Stern* v. *Gressman*, Supreme Court Practice, 3rd ed. 1962, p. 168.), and there is no difference between these two situations.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

Mandamus is not a discretionary writ where the petitioner has a clear right to a writ of mandamus and there is no other legal remedy. In that situation the trial judge's function is always ministerial, not judicial. A rule that mandamus is a discretionary writ under such circumstances when applied to deny the writ is a denial of the protection and equal protection of the laws, and a deprivation of property without due process of law, in violation of the 14th Amendment, Section 1, to the Constitution of the United States.

The Appellate Court held:

> "In this case, the petitioner had, and the appellants have, a clear legal right to the issuance of a writ of mandamus * * *" (Opinion, p. 10)

In commenting on the appellants' argument, the Appellate Court said:

> "The appellants contend that where a clear legal right to the writ is shown, the court must grant the petition. Some of their authorities (e.g. *People ex rel. Jonas* v. *Schlaeger*, 381 Ill. 146, 45 N.E. 2d 30 (1942); *People ex rel. Blome* v. *Nudelman*, 373 Ill. 220, 25 N.E. 2d 811 (1940); *Dorris* v. *Johnson*, 363 Ill. 236, 2 N.E. 2d 74 (1936); *I.C.R.R.* v. *The People*, 143 Ill. 434, 33 N.E. 173 (1892) support their position, but the weight of authority does not. The weight of authority holds that even where a clear legal right to the writ is shown, the court, in view of the consequences attendant to its issuance may still deny it. (citing 5 Illinois cases, 3 from the Illi-

nois Supreme Court)." (Opinion, p. 9) "However, despite a clear right to a writ of mandamus, the court, in view of the consequences accompanying its issuance, did not abuse its discretion in denying the petition." (Opinion, p. 12.)

The Appellate Court overlooked or misapprehended the appellants' quotation from 2 Bouvier's Law Dictionary, Rawle's 3rd Revision, 1914, p. 2075, at pages 32-33 of their brief, where it states:

> "In the United States, it is becoming more and more assimilated to an ordinary remedy, to the use of which the parties are entitled as of right. It is in this sense that Taney, C.J., characterized it in modern practice as 'nothing more than an action at law between the parties'; *Kentucky* v. *Dennison*, 24 How. (U.S.) 66.";

and their reference to 2 Bouvier's Law Dictionary, Rawle's 3rd Revision, 1914, p. 2074, at page 32 of their brief, where it states:

> "But where a clear legal right to a writ is shown, the court has no discretion about granting it; *Illinois Central R. Co.* v. *People*, 143 Ill. 434, 33 N.E. 173, 19 L.R.A. 119.";

without citing any case to the contrary.

In fact, Bouvier states English authority to the same effect.

> "Its use is defined by Lord Mansfield in *Rex* v. *Barker*, 3 Burr. 1265:
>
> > 'It was introduced to prevent disorder from a failure of justice and defect of police, when the law has established no specific remedy, and where, in justice and good government there ought to be one.'

> 'If there be a *right*, and no other specific *remedy*, this should not be denied.' The same principles are declared by Lord Ellenborough in *Rex* v. *Archbishop of Canterbury*, 8 East 219. See 6 Ad. & E. 321." (Emphasis theirs.)

2 Bouvier's Law Dictionary, Rawle's 3rd Revision, 1914, pp. 2074-2075.

11 Halisbury's Laws of England, 3rd Ed., 1948, Butterworth, p. 85, n. (h), states:

> *"Where the right which appellant seeks to enforce is the performance of duties of a public character, which cannot be secured at all if a mandamus is refused, and the duties are only ministerial, the issue of the writ is not discretional."* (Emphasis ours.)

In *Rex* v. *Sarum* (Bishop) [1916] 1 K.B. 466, 16 Digest 309, 1208, the case cited by Halisbury, the Court said:

> "It was, however, contended in showing cause against the rule that this Court has in all cases a discretion in issuing such a writ, and that under all the circumstances they ought to decline to do so. • • • *In the present case the right to perform the duties, which are of a public character, cannot be secured at all if a mandamus is refused. We do not think that in such a case as this the issue of the writ is discretionary, assuming that the Bishop's duties are only ministerial."* (Emphasis ours.)

Lord Atkin states the English law on the subject in "The Encyclopedia of Court Forms and Precedents In Civil Proceedings". Butterworth, 1948, pages 245 to 247:

> "By sect. 7 of the Administration of (Miscellaneous Provisions) Act, 1938, an order of *mandamus* is now made where formerly a writ of mandamus issued. • • •

"The making of an order of *mandamus* is in the discretion of the Court, *unless the right sought to be enforced is the performance of duties of a public character which are of a ministerial and performance of which cannot be secured at all if a mandamus is refused.* • • • An order will not be made where it cannot be enforced, and the Court will not order something which is impossible of performance, neither will an order be made where the party complained of can, by the exercise of other powers, render it inoperative, or where obedience to the order will not alter the position." (Emphasis ours.)

The English cases are reviewed by the court in *Bassett* v. *Atwater*, 1895, 65 Conn. 355, 32 A. 937, 937-938, 939, where the Court said:

"The writ was often issued in cases where the question in controversy was rather upon some private right rather than a public one. The courts then followed the rule given by Lord Mansfield in *Rex* v. *Barker*, 3 Burrows, 1267, that: 'The value of the matter, or the degree of its importance to the public policy, is not scrupulously weighed. *If there be a right, and no other specific remedy, this should not be denied. Rex* v. *Turkey Co.*, 2 Burrows, 943; *Rex* v. *Wildman*, 2 Strange, 879; *White's Case*, 2 Ld. Raym. 1004; *Case of Schriven*, 2 Strange, 832; *Dacosta* v. *Russia Co.*, Id. 783; *Anon.*, Id. 696. • • • Mr. High in • • • his valuable work on Mandamus, says: • • • *The test to be applied* • • • *in determining upon the right to relief by mandamus, is to inquire whether the party aggrieved has a clear legal right, and whether he has any other adequate remedy*, since the writ only belongs to those who have legal rights to enforce, who find themselves without an appropriate remedy. *And whenever the conditions above noticed co-exist, the right to the extraordinary aid of a mandamus may be regarded*

as to that extent ex debito justitiae. [1 Bouvier's Law Dictionary, Rawle's 3rd Rev., 1103. '(*Lat.*). *As a debt of justice. As a matter of legal right.* 3 Bla. 48.] * * * [*A*]*ll corporations are creatures of public law* * * * [*T*]*he duty* [to call a special stockholders' meeting on proper demand] *which these by-laws command is a ministerial one* * * * *And there is no adequate remedy to enforce this duty other than this writ* * * * *It is a duty created by the laws of the state, and therefore properly enforceable by the courts of the state, although only called into exercise through the by-laws of the corporation.*" (Emphasis ours.)

See also: *People ex rel City of Chicago* v. *Kent*. 300 Ill. 324, 331; *Cella* v. *Davidson*, 1931, 304 Pa. 389, 395; *State ex rel Brown* v. *McQuade*, 1905, 36 Wash. 574, 583-586; *Sypers* v. *McCune*, 1958, 143 W. Va. 315, 321, 325.

It should be remembered that in the absence of statutory provisions on the subject, that mandamus is the only judicial remedy available to compel the calling of a meeting, the courts have no other authority in the premises. 38 C.J. 798, n. 57.

In the present case petitioner had a clear legal right for a writ of mandamus, and there is no other remedy. Accordingly, the circuit court only had a ministerial duty to enforce and had no more discretion to ignore that duty than the respondents have to ignore it.

A new constitutional question arose as a result of the Appellate Court's action in recognizing that petitioner and the other members of The Chicago Law Institute have a clear legal right to a writ of mandamus, which the trial court did not recognize, the new question being a question not included within the question passed

on by the trial court and, hence, not passed on by the trial court: Whether a rule that mandamus is a discretionary writ where a petitioner has a clear legal right to a writ of mandamus and there is no other legal remedy when applied to deny the writ is a denial of a remedy for an injury and wrong, a denial of the protection and equal protection of the laws, and a deprivation of property without due process of law, in violation of the 14th Amendment, Section 1, of the Constitution of the United States. The 14th Amendment provides that no State shall deny to any person within its jurisdiction the equal protection of its laws. In *Rex* v. *Barker*, 1762, 3 Burr. 1265, 1267, Lord Mansfield correctly observed that to deny a writ of mandamus under such circumstances is to put the petitioner "out of the protection of the law." It follows, the State of Illinois has deprived petitioner and all the members of The Chicago Law Institute of the equal protection of the law. The 14th Amendment, Section 1, provides that no person shall be deprived of life, liberty, or property, without due process of law. In *Durkin* v. *Hey*, 376 Ill. 292, 300, the Court said:

> "The guaranty of due process requires that every man shall have the protection of his day in court and the benefit of the protection of his day in court and the benefit of the general law."

In *Brinkeroff-Faris* v. *Hill*, 1929, 281 U.S. 673, 674, the Court said:

> "Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy, unless there is, or was, afforded him some real opportunity to protect it."

It is submitted that the rule stated and applied in this case by the Appellate Court has deprived petitioner and the other members of The Chicago Law Institute of their property without due process of law.

The Appellate Court, accordingly, erred in holding that, even where a clear legal right to a writ is shown, the Court, in view of the consequences attendant to its issuance, may still deny a writ of mandamus, and in affirming the judgment of the trial court, and the Supreme Court of Illinois erred in denying the petition for appeal as a matter of right, necessarily erroneously holding that it did not.

II.

The Appellate Court erred in failing to pass on the three questions under the Constitution of the United States and of this State that were raised in and passed on adversely to petitioner and the other members of The Chicago Law Institute in the trial court, because they are determinative of this case, and in failing in its duty to do so, the Appellate Court has deprived the appellants and all the members of The Chicago Law Institute of their procedural rights without due process of law, and has denied them the protection and equal protection of the laws, in violation of their rights under the 14th Amendment, Section 1, to the Constitution of the United States, and the Supreme Court of Illinois erred in holding by denying the Petition for Appeal as a Matter of Right that it did not.

The appellants set forth three specific questions in their brief in the Appellate Court arising under the 14th Amendment, Section 1, of the Constitution of the United States, that were raised in and passed on adversely to petitioner and the other members of The Chicago Law Institute in the trial court, an affirmative answer to all

three of which would require reversal of the judgment appealed from, at pages 3 and 4 of their brief, but the Appellate Court saw fit to ignore them in its opinion.

The first question is:

> Whether the right of the members to hold an annual meeting, and the right of the members to vote, (and the interest they have in the assets of the corporation), are *property* within the meaning of that word as read and the 14th Amendment, Section 1, to the Constitution of the United States.

The affirmative answer to the question is established by the decision of the Supreme Court of the United States in *Trustees of Dartmouth College* v. *Woodward*, 1819, 4 Wheat 518. It was the heart of Daniel Webster's argument. It is fully supported by the discussion in 5 Fletcher Cyclopedic Corporations, Permanent Edition, 1967 Revised Volume, pp. 3, 6, 7, 27, 28-9, 43, 43-7, 127, and 128.

Assuming an affirmative answer to the first question, the second question is:

> Whether the members of the corporation have sustained *injuries and wrongs* to said property by the failure of the defendants to give notice of the annual meeting for 1966 and 1967 [and, of course, 1968 and 1969 and 1970 to date], without which they could not be held, for which the members *ought* to have a *certain remedy* and, if so, whether mandamus is the certain remedy to which they are entitled?

Once it is established that the interest the members have in any corporation, business or charitable, for profit or not for profit, and in their right to vote for and elect officers and managers, and in their right to determine how the affairs of the corporation will be conducted, is property, it follows that the members of the Chicago Law

Institute have sustained injuries and wrongs in property by the respondents and the other holdover officers and the holdover managers for which they ought to have a remedy, it being evident that the words in Section 4 of the Charter "and until others are elected in their stead", and in Section 3 of the By-Laws "and until their successors are elected" cannot be construed as a power of the incumbent officers and managers to extend their terms of office indefinitely; and that the right of the members of The Chicago Law Institute to hold an annual meeting has not become abstract, and that the corporation has not been in effect dissolved, and that a meeting would serve a useful purpose, in that the members might ratify the unauthorized conduct of the officers and managers, and take steps to dissolve the corporation, or might elect new officers, and repudiate the unauthorized conduct of the present officers and managers, and take steps to recover the assets that have been given away; and that the pending litigation has no effect on the corporate structure whatsoever.

Assuming an affirmative answer to the first two questions, the third question is:

> Whether the members of the corporation have been *deprived* of said property and a certain remedy without due process of law, and denied the equal protection of the laws, by the State of Illinois, by the action of the trial court in denying their motion for summary judgment and their petition for a writ of mandamus and in dismissing their petition, in violation of the 14th Amendment, Section 1, to the Constitution of the United States.

An affirmative answer is obviously necessary.

CONCLUSION.

The State of Illinois has, in effect, repudiated the constitutional principles on which the decision of this Court in the *Dartmouth College* case is based in holding that the petitioners have no property interest in the holding of a meeting of the members of The Chicago Law Institute and in the right to vote that it is under a duty to protect by the only means by which it can be protected—issuance of a writ of mandamus. It has put the petitioners outside the protection of the law. This cannot be permitted to happen for if it is permitted to happen it will undermine the Constitution.

This petition for a writ of certiorari should be granted.

Respectfully submitted,

HUGH M. MATCHETT
Petitioner, Pro Se

WILLIAM HETTLEMAN
Attorney for Petitioner,
Lawrence Lenit

APPENDIX A

1.

Circuit Court of Cook County, Illinois
County Department, Law Division

Lawrence Lenit, Petitioner, vs. Leo J. Powers, John P. Coghlan, and The Chicago Law Institute, an Illinois corporation, Defendants, Case No. 66 L 6225.

Judgment Entered August 16th, 1967:

"This matter comes on for hearing on the Second Amended Petition For Writ Of Mandamus and the Answer To Second Amended Petition, and on Petitioner's Motion For Summary Judgment. The Court finds that the right of the members of the Chicago Law Institute to hold an annual meeting has become abstract in that the corporation is in effect dissolved and has no assets and a meeting would serve no useful purpose. The Court has considered each of the questions raised by petitioner arising under the constitution of the United States and of this State and holds each of them to be without merit. The Court holds that the Petitioner's Motion For Summary Judgment should be, and it hereby is, denied; that the Petitioner's Second Amended Petition For Writ Of Mandamus should be, and it hereby is, denied; and that the Defendants' Request For Relief in their Answer To Second Amended Petition that this Court dismiss the Second Amended Complaint For Mandamus and assess Defendants' costs herein against Petitioner Lawrence Lenit should be, and it hereby is, allowed. The Second Amended Petition For Writ Of Mandamus is

dismissed. Judgment is given Defendants and they shall recover their costs.

Enter: /s/ Charles S. Dougherty
Judge"

2.

Supreme Court of Illinois

Lawrence Lenit, Petitioner, Appellant, Hugh M. Matchett Aggrieved Person, Appellant, vs. Leo J. Powers, John P. Coghlan, and The Chicago Law Institute, Appellees, Case No. 40990.

Transfer Order Entered March 11th, 1968:

"In this appeal from an order denying issuance of a writ of mandamus appellant states that the ultimate issue is whether an appeal pending before the Supreme Court of the United States involving the same subject matter is a defense in this case. Such allegation does not constitute a substantial constitutional question and, on the Court's own motion, this cause is transferred to the Appellate Court for the First District.

And now, on this day, the Court having diligently examined and inspected the briefs and argument filed herein, and now being fully advised in the premises is of the opinion, finds and adjudges that this Court has no jurisdiction on direct appeal in this case.

Therefore, it is ordered by the Court that this case be and the same is hereby transferred to the Appellate Court for the First District of the State of Illinois, and the Clerk of this Court is directed to transmit the transcript and files herein with the order of this transfer to the Clerk of said Appellate Court.

And it is further considered by the Court that the said appellees recover of and from the said appellant costs by them in this behalf expended, to be taxed, and that they have execution therefor."

Orders entered April 2nd, 1970:

"Petition of Appellant, pro se, Hugh M. Matchett, for Rehearing. Denied."

"Petition of Appellant, Lawrence Lenit, for Rehearing. Denied."

"Petition of Appellant, Hugh M. Matchett, for Certificate of Importance. Denied."

Order entered April 16th, 1970:

"Motion Lawrence Lenit, certain Appellant, for a Certificate of Importance under Supreme Court Rule 316, as per affidavit. Denied."

Supreme Court of Illinois

Lawrence Lenit, Petitioner-Appellant, and Hugh M. Matchett, Aggrieved Person, Appellant, vs. Leo J. Powers, John P. Coghlan, and The Chicago Law Institute, Defendants-Appellees, Case No. 43164.

Order entered September 24th, 1970:

"And now, on this day, the Court having duly considered the motion by respondents to dismiss petition for appeal as a matter of right, and being fully advised of and concerning the premises;

It Is Hereby Ordered that the motion by respondents to dismiss petition for appeal as a matter of right be, and the same is, denied and it is further ordered that it is unnecessary to consider the motion by petitioners to

strike the motion by respondents to dismiss petition for appeal as a matter of right."

Mandate issued October 5th, 1970:

"And now on this day the Court having duly considered the Petition for Leave to Appeal herein and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies Leave to Appeal herein.

And it is further considered by the Court that the said Respondents recover of and from the said Petitioners costs by them in this behalf expended, to be taxed, and that they have execution therefor."

Order entered November 12th, 1970:

"And now, on this day, the Court having duly considered the motion by petitioners for the clarification of order denying petition for appeal as a matter of right, and being fully advised of and concerning the premises:

It Is Hereby Ordered that the motion by petitioners for clarification of order denying petition for appeal as a matter of right be, and the same is, denied."

Supreme Court of Illinois

Hugh M. Matchett, Petitioner-Appellant, vs. The House of Vision, William M. Hiyane, and Acro Contact Lens Service, Inc., Respondents-Appellees, Case No. 42932.

Order entered on May 13th, 1970:

"An order denying a combined petition for leave to appeal as a matter of right and a petition for leave to appeal is an adjudication that both petitions are denied. It is unnecessary for the Court to give its reasons for the denial of the petitions. The motion by petitioner to vacate the order entered March 20, 1970, is denied."

3.

Appellate Court of Illinois
First District, Third Division

Opinion Rendered June 19th, 1969 and published as 120 Ill. App. 2d 411, 257 N.E. 2d 142:

Lawrence Lenit, Petitioner-Appellant, and Hugh M. Matchett, Aggrieved Person-Appellant, vs. Leo J. Powers, John P. Coghlan, and The Chicago Law Institute, Defendants-Appellees, Case No. 53040.

Mr. Justice Dempsey Delivered The Opinion Of The Court.

A petition for a writ of mandamus was brought to compel the calling of an annual meeting of the membership of the Chicago Law Institute. The petition was dismissed and this appeal followed.

The petitioner, Lawrence Lenit, is a member of the Law Institute; another petitioner, William Hettleman—also a member of the institute—was dismissed from the cause early in the proceedings. The respondent, Chicago Law Institute, is a private corporation, created by a special act of the Illinois Legislature (Laws of Illinois, 1857, p. 1186) which corporation operated and maintained a law library located on the 10th floor of the County Building—rent free. The respondents, Leo Powers and John Coghlan, were, at the time the petition was filed, the president and secretary respectively of the Law Institute.

On December 6, 1965, the Law Institute entered into an agreement to transfer the institute's law library and other assets to the County of Cook. The County planned to establish a free law library on the 29th floor of the

Chicago Civic Center and the institute believed it could not compete with the County—even if the institute could find new, rent-free quarters.

On December 10, 1965, the Chicago Law Institute and two of its members filed a complaint for declaratory judgment: *Chicago Law Institute* v. *County of Cook*. The complaint designated as defendants the County, the Attorney General of Illinois and several individuals whom the respondents in the present action describe as "a representative number of members of the Chicago Law Institute, including some of who were opposed to the relief which the plaintiffs requested." Two of the members named were the petitioners in the instant case, Lenit and Hettleman. The complaint stated that the Law Institute could not continue to operate in competition with the free law library proposed by Cook County. Therefore, the plaintiffs requested that the Chancery Division of the Circuit Court, under the doctrine of *cy pres*, apply the assets of the Law Institute to a similar charitable use. Specifically, they asked approval of the agreement to transfer the institute's law library and other assets to the County to be used for the County's law library. They also asked for direction authorizing the institute and the County to execute the agreement.

After the suit was filed but before it reached a final decree, the following occurred: The 1966 annual meeting of the institute for the election of officers and managers directed by the by-laws of the institute to be held on the last Friday in January of each year was not held; the respondents and the other officers and managers elected at the January 1965 meeting continued in office. No meeting was called to preserve the status quo pending

the disposition of the litigation seeking approval of the transfer of the assets of the institute. In March 1966, a meeting had yet to be held and the petitioners formally demanded that the acting officers and managers of the institute issue a call for one, but the demand was either refused or ignored.

Thereafter, in April 1966, the petitioners filed a petition for a writ of mandamus to compel the respondents to call the annual meeting of the institute. The respondents filed a motion to dismiss in May of 1966. The next month, pursuant to stipulation, the petitioner, Hettleman, was dismissed from the case.

On July 8, 1966, the remaining petitioner, Lenit, filed an amended petition. One week later, the respondents filed a petition for a temporary injunction. The respondents' petition stated that on July 13, 1966, the Circuit Court entered a final decree in the case of *Chicago Law Institute* v. *County of Cook* (hereafter this final decree will be referred to as the Circuit Court decree) which approved the agreement entered into between the County and the institute. The respondents asserted that they intended to raise the Circuit Court decree as a defense to the amended petition for a writ of mandamus. The respondents also asserted that some members of the institute had called a special meeting to elect officers. They alleged that the special meeting would oust the Circuit Court of jurisdiction over the mandamus petition. They prayed for an injunction to restrain the members of the institute from holding any special meeting for any purpose whatsoever except an informal meeting to discuss the future of the institute, an appeal from the Circuit Court decree and to solicit funds to finance such an appeal. The temporary injunction was allowed.

The respondents presented their motion to dismiss the amended petition on July 25, 1966. They contended that no meeting should be held pending disposition of the appeal from the Circuit Court decree. Some members of the institute had filed notices of appeal to the Appellate Court from that decree. They did not make the notice of appeal a supersedeas, however, or file a supersedeas bond. The respondents contended that a meeting of the institute would interfere with the jurisdiction of the Appellate Court.

The attorney for the petitioner withdrew in June 1966. From that time, Lenit represented himself pro se. In October 1966 Hugh M. Matchett, a member of the institute, was permitted to file an appearance as additional counsel for him.

On December 20, 1966, the respondents filed an amended motion to dismiss the amended petition. It advised the court that the previous week the Appellate Court dismissed an appeal from the Circuit Court decree and also denied a petition for leave to file a late notice of appeal. It also said that all other appeals taken from the decree had been finally dismissed and that the time within which to take further appeals had expired. (In addition to the appeals to the Appellate Court, other appeals had been taken to the Illinois Supreme Court and a separate action had been filed in the United States District Court. These had also been terminated at the time of the respondents' motion to dismiss.) The motion stated that the agreement between the institute and the County was in full force and effect, making moot the question of further adjournment of the institute's annual meeting in order to preserve the status quo. It de-

clared the intention of the respondents to call a meeting of the institute at the earliest practicable time to report to the membership, file a current account and call for the election of officers. The motion was allowed January 12, 1967, and the amended petition was dismissed.

On February 10, 1967, the petitioner filed a motion to vacate the judgment of January 12th and to amend the previously amended petition. The motion referred to the respondents' intention, expressed in their motion to dismiss, to call a meeting at the earliest practicable time and alleged that 28 days had since passed and that neither the January 1966 meeting nor the now overdue January 1967 one had been called. The petitioner's motion demanded the issuance of a writ of mandamus to compel the calling of a meeting. On February 14, 1967, the court vacated the judgment, allowed the amendment of the amended petition and ordered the respondents to answer.

At this point, it should be noted that in January 1967 a motion to vacate the Appellate Court's dismissal of the appeal was filed and denied. In February 1967 the denial was appealed to the Illinois Supreme Court.

The petitioner filed his second amended petition on February 21, 1967, and on March 1st the respondents filed their answer. Thereafter, on August 9, 1967, the petitioner filed a motion for summary judgment. On August 16, 1967, the court entered a judgment for the respondents. In doing so, the court recognized the transfer of assets which had occurred sometime after August 22, 1966, the date the Circuit Court entered an order approving the "physical transfer of the books of the Law Institute to the 29th floor of the Civic Center." The

court said, "The right of the members of the Chicago Law Institute to hold an annual meeting has become abstract in that the corporation is in effect dissolved and has no assets and a meeting would serve no useful purpose." The court dismissed the second amended petition for a writ of mandamus and assessed costs against the petitioner.

The petitioner filed a notice of appeal to the Illinois Supreme Court. His attorney, Matchett, also filed a notice of appeal but for himself, not his client. Matchett's appeal identified himself as a "member in good standing of [the] Chicago Law Institute, an Illinois corporation, a person not a party of record prejudiced or aggrieved by the Judgment. . . ." He asked that his appeal be treated as an original action (see Ill. Rev. Stat., 1967, ch. 110A, sec. 381) and prayed that the judgment of the Circuit Court be reversed without remandment and for a writ of mandamus directing the respondents to call the annual meetings for January 1966 and 1967. The appeals of Lenit and Matchett were consolidated and one brief was filed in the Supreme Court. As a basis of jurisdiction, they alleged that the failure of the institute to hold an annual meeting and elect new officers deprived the appellants, as members of the institute, of property rights—the rights of members to hold a meeting and to vote, and the interest of members in the assets of the corporation and their distribution in the event of dissolution—in violation of the 14th amendment of the Federal Constitution and Artcle II, sections 2 and 19, of the Illinois Constitution. The appellants further alleged that the ultimate issue in the case was whether an appeal then pending before the United States Supreme Court from the Circuit Court decree constituted a de-

fense to the mandamus petition. The Illinois Supreme Court concluded that it did not have jurisdiction of the case on direct appeal and transferred the case to this court.

Parenthetically, it is of interest to note the following: The United States Supreme Court on March 11, 1968, in a per curiam decision, dismissed the appeal before it for want of jurisdiction and then, treating the papers for appeal as a petition for a writ of certiorari, denied certiorari. *Hettleman* v. *Chicago Law Institute*, 390 U.S. 338 (1968) rehearing denied 390 U.S. 1036 (1968). This, however, did not end the litigation seeking approval of the agreement to transfer the assets of the institute to the County. On July 11, 1968, two members of the institute, Hettleman and Edmunds, filed a petition to vacate as null and void the decree of the Circuit Court. The petition was denied August 9, 1968, and a motion to vacate that order was denied August 19, 1968. This litigation is still in progress. A direct appeal has been taken to the Illinois Supreme Court from the denials of the motion to vacate.

In his second amended petition, Lenit had asked for a writ of mandamus to compel the calling of the January 1966 and 1967 meetings. In their brief in this court, Lenit and Matchett ask that these meetings be consolidated with the January 1968 meeting. They have not amended their brief to include the January 1969 meeting, the time for which has now also passed, but we will consider their appeal as if this had been done.

The issue in this appeal is whether the court erred in refusing to issue a writ of mandamus. Mandamus is an extraordinary remedy. *Daniels* v. *Cavner*, 404 Ill. 372, 88

N.E. 2d 823 (1949); *National Fire Ins. Co. of Hartford* v. *Municipal Court,* 28 Ill. App. 2d 401, 171 N.E. 2d 687 (1961). One seeking the writ must show a clear right to it. *People ex rel, Adamowski* v. *Dougherty,* 19 Ill. 2d 393, 167 N.E. 2d 181 (1960); *People ex rel. National Bank of Austin* v. *County of Cook,* 56 Ill. App. 2d 436, 206 N.E. 2d 441 (1965). Where the applicant shows a clear legal right to the relief he seeks, the court cannot arbitrarily refuse it. *People ex rel. McCormick* v. *Western Cold Storage Co.,* 287 Ill. 612, 123 N.E. 43 (1919); *People ex rel. Bradford Nat. Bank of Greenville* v. *School Directors of Dist. No. 62, Franklin County,* 309 Ill. App. 242, 32 N.E. 2d 1008 (1941). However, mandamus is not a writ of right. *People ex rel. Cannella* v. *City of Chicago,* 7 Ill. 2d 416, 131 N.E. 2d 98 (1956); *People ex rel. Aramburu* v. *City of Chicago,* 73 Ill. App. 2d 184, 219 N.E. 2d 548 (1966). Despite the presence of a clear legal right for which mandamus is an appropriate remedy, the writ may be denied in the exercise of sound judicial discretion because of the consequences accompanying its issuance. *People ex rel. Harrison* v. *Kelly,* 391 Ill. 136, 62 N.E. 2d 705 (1945); *Hagemann* v. *Chicago Great Western Ry. Co.,* 2 Ill. App. 2d 401, 119 N.E. 2d 523 (1954). The writ may be denied where it will cause confusion and disorder or fail to operate impartially or promote substantial justice. *People ex rel. Baird & Warner, Inc.* v. *Lindheimer,* 370 Ill. 424, 19 N.E. 2d 336 (1939); *People ex rel. Lyle* v. *City of Chicago,* 360 Ill. 25, 195 N.E. 451 (1935). It may also be disallowed where the issuance will be a fruitless or unavailing act (*People ex rel. Cassidy* v. *Fisher,* 372 Ill. 146, 22 N.E. 2d 937 (1939); *Thornton* v. *Ramsey,* 24 Ill. App. 2d 452, 165 N.E. 2d 65 (1959)), serve no useful or beneficial purpose

(*People ex rel. Town of Cicero* v. *Sweitzer*, 339 Ill. 28, 170 N.E. 728 (1930); *Parrish* v. *Miller*, 336 Ill. 630, 168 N.E. 671 (1929)) or where it will directly affect another judicial proceeding then pending (*People ex rel. Harrison* v. *Kelly, supra; People ex rel Staats-Zeitung Co.* v. *Common Council of City of Chicago*, 53 Ill. 424 (1870).)

The appellants contend that where a clear legal right to the writ is shown, the court must grant the petition. Some of their authorities (*e.g. People ex rel. Jonas* v. *Schlaeger*, 381 Ill. 146, 45 N.E. 2d 30 (1942); *People ex rel. Blome* v. *Nudelman*, 373 Ill. 220, 25 N.E. 2d 811 (1940); *Dorris* v. *Johnson*, 363 Ill. 236, 2 N.E. 2d 74 (1936); *I.C.R.R. Co.* v. *The People*, 143 Ill. 434, 33 N.E. 173 (1892)) support their position, but the weight of authority does not. The weight of authority holds that even where a clear legal right to the writ is shown, the court, in view of the consequences attendant to its issuance may still deny it. *E.g. People ex rel Stettauer* v. *Olsen*, 215 Ill. 620, 74 N.E. 785 (1905); *People ex rel. Harrison* v. *Kelly, supra*; *People ex rel. McCormick* v. *Western Cold Storage Co., supra*; *Hagemann* v. *Chicago Great Western Ry. Co., supra*; *People ex rel. Bradford Nat. Bank of Greenville* v. *School Directors of Dist. No. 62, Franklin County, supra.*

In this case, the petitioner had, and the appellants have, a clear legal right to the issuance of a writ of mandamus because:

(1) The by-laws of the institute provide for an annual meeting for the election of officers and managers and to conduct other business. Section 12 of the by-laws, as amended January 29, 1955, states:

> "There shall be an annual meeting of the Institute for the election of officers and managers, and the

transaction of such other business as shall come before it, on the last Friday in the month of January of each year at 3:00 o'clock in the afternoon at the Institute rooms, unless otherwise ordered by the Executive Committee. . . ."

(2) The petitioner-appellant, Lenit, and the appellant, Matchett, are members in good standing of the institute. According to section 12 of the by-laws, such members and only such have the right to vote.

(3) The corporation is still in existence. At the time of the original petition for the writ, the agreement to transfer its assets had been entered but not approved by the courts. At the time of the denial of the writ, it was judicially approved and the assets transferred, but even today the litigation continues and the corporation has not been dissolved.

(4) At the time of the first petition for a writ of mandamus, despite the litigation in process seeking approval of the agreement to transfer, and at the time of the dismissal of the second amended petition—which occurred after the Circuit Court decree approving the agreement to transfer and after the transfer itself—there was legitimate business to be conducted at a meeting. For example, the old officers could have filed the annual report or reports. The members could have re-elected the incumbent officers or elected new ones and directed them to support or oppose in the Circuit Court or on appeal the litigation seeking approval of the agreement to transfer. The officers could also have been directed to prepare to reinstate the library or dissolve the institute or to discuss the future of the institute in anticipation of the termination of that litigation. Today there is still much of the same business to be conducted.

(5) The by-laws of the Law Institute do not permit an indefinite postponement or omission of the annual meeting. One by-law (section 12) does provide for a failure to hold the annual meeting upon the order of the Executive Committee and another (section 3) provides for the continuation in office of the officers and managers until their successors are elected but these by-laws permit only temporary postponements of a meeting. They do not afford the incumbent officeholders the privilege of extending their terms indefinitely. See 5 Fletcher, Cyclopedia Corporations, ch. 13, sec. 2001 (perm. ed. rev. vol. 1967).

Where a corporation is not dissolved, there is legitimate business for shareholders to conduct at an annual meeting. This is true even where the corporation is in receivership. *Butler* v. *Beach*, 82 Conn. 417, 74 A. 748 (1909); *Lehigh Coal and Navigation Co.* v. *Central R.R. Co. of N.J.*, 35 N.J. Eq. 349 (1882); *State* v. *Merchant*, 37 Ohio St. 251 (1881). The right to vote and act in corporate matters is a valuable right, which cannot be taken away by the act or failure to act of the corporate officers. *Albert E. Touchet, Inc.* v. *Touchet*, 264 Mass. 499, 163 N.E. 184 (1928); see also *Trustees of Dartmouth College* v. *Woodward*, 4 Wheat. 518 (1819) (Story, J. concurring). Mandamus is a proper remedy to compel the calling of an annual meeting and election. 55 C.J.S. Mandamus, sec. 221; see *e.g. People ex rel. Fleming* v. *Hart*, 11 N.Y.S. 673 (1890); *People ex rel. Maclaury* v. *Hart*, 11 N.Y.S. 670 (1890).

However, despite a clear right to a writ of mandamus, the court, in view of the consequences accompanying its issuance, did not abuse its discretion in denying the peti-

tion. A meeting was not necessary to promote substantial justice; the occurrences at a meeting might have directly interferred with another judicial proceeding then pending and there might have been confusion and disorder.

An annual meeting was not necessary to promote substantial justice because the primary purpose of the petitioner in demanding one—to oppose the agreement to transfer—could have been accomplished through opposition to the declaratory judgment action seeking approval of the agreement. Hettleman, the petitioner who later withdrew, Lenit, the petitioner-appellant and Matchett, an appellant, had an opportunity to contest the agreement in the declaratory judgment action. Hettleman and Lenit were parties to the chancery proceeding which at the time of the filing of the original petition for the writ was before the Circuit Court but had not been decided. We do not know whether the appellant, Matchett, was a party or not, but as a member of the Law Institute he had a right to intervene. See Ill. Rev. Stat., 1965, ch. 110, sec. 26.1. In addition, if the allegation of the respondents in this case is correct (and Matchett has not challenged it), Matchett's interest in the chancery suit was protected by naming as defendants a representative number of members of the institute, including some who were opposed to the transfer. Any objection which the petitioners or appellants had to the transfer could have been raised in the declaratory judgment action for the purpose of that action was to determine the validity of the agreement.

The occurrences at a meeting might have directly interfered with the decree of the Circuit Court approving

the agreement. For example, at a meeting, the appellants declared that the members of the institute could ratify or reject the agreement and could support the old officers or elect new ones and make the holdovers account for their dereliction of duty in entering the agreement. The necessity of a vote of ratification and the propriety of the officers' actions in entering the agreement were questions which were or could have been determined in the chancery suit. Furthermore, at a meeting, the appellants indicated that the members could re-elect the old officers or elect new ones who would repudiate the agreement and take steps to recover the transferred assets. The new officers, though, could not rightfully act in conflict with the court-approved transfer. Their only recourse would be to appeal the decree approving it.

A meeting might have resulted in confusion and disorder. With the outcome of the transfer-litigation unresolved, the officers of the corporation would not have known where to proceed. They could not have dissolved the corporation because the litigation was not settled; they could not have repudiated the agreement to transfer and taken back the assets because the appeal from the order approving it was not yet successful.

Moreover, some of the appellants' declared purposes of an annual meeting would have been fruitless and unavailing. An annual assessment would have been pointless for a library which had given away all its assets; an annual report would have been of minimal interest for a library which had ceased to operate.

There was legitimate business to be conducted at an annual meeting but this business was not so essential

to the interests of the corporation or its members as to require that a meeting be held despite the consequences that would ensue. An election of officers could have been held and the officers directed to prosecute or defend appeals from the decree approving the transfer, although this was not essential to the representation of the interests of the corporation or its members in that litigation. An annual report detailing the agreement to transfer and the actions taken to effect it could have been presented, but much of this information was available in the record of the chancery suit. Preparations for the reinstatement of the library or dissolution of the corporation could have been made but also could have awaited the termination of the litigation.

Thus, at the time the second amended petition for a writ of mandamus was denied, the ordering of a meeting was not essential to the interest of justice while good reason militated against it. The court did not abuse its discretion in refusing to issue the writ. Today there is even less reason to order the calling of a meeting. The litigation seeking approval of the transfer is closer to termination. Appeals all the way to the United States Supreme Court have failed to upset the decree which approved the transfer and a motion to vacate the decree has twice been denied. No useful purpose would be served by holding a meeting at this point. Chaos and confusion could well result, including duplication of what could and would be accomplished at a meeting following the finality of the litigation of the agreement to transfer. When that litigation is settled, the future of the Law Institute will be clear. Then a meeting of the institute can be held.

No claim has been made that a meeting will not be held at the completion of the litigation of the agreement. All along the respondents have declared such an intention. Their failure to call a meeting in January 1967 when they said they would do so is explained by the continuation of the appeals from the Circuit Court decree, the motion to vacate the order of the Appellate Court, its denial and the appeal to the Illinois Supreme Court.

The judgment of the Circuit Court will be affirmed.

Affirmed.

SULLIVAN, P.J., and SCHWARTZ, J., concur.

Appellate Court of Illinois
First District, Third Division

Lawrence Lenit, Petitioner-Appellant, and Hugh M. Matchett, Aggrieved Person-Appellant, vs. Leo J. Powers, John P. Coghlan, and The Chicago Law Institute, Defendants-Appellees, Case No. 53040.

Affirming Order entered June 19th, 1969:

"The judgment of the Circuit Court of Cook County is AFFIRMED and Appellees recover costs from Appellants. Execution may issue."

APPENDIX B

Constitution Of The United States

1 Ill. Rev. Stat. 1969, Const. U. S.

Article I, Section 10

P. 3

"N/o State shall • • • pass any • • • Law impairing the Obligation of Contracts, • • •."

Sixth Amendment

P. 6

"N/or shall private property be taken for public use, without just compensation."

Fourteenth Amendment, Section 1

P. 7

"N/or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Constitution Of Illinois

1 Ill. Rev. Stat. 1969, Const. Ill.

Article VI, Section 5

P. 18

"The Supreme Court may exercise original jurisdiction in cases relating to the revenue, mandamus, prohibition and habeas corpus, such original jurisdiction as may be necessary to the complete determination of any cause on review, and only appellate jurisdiction in all other cases.

"Appeals from the final judgments of circuit courts shall lie directly to the Supreme Court as a matter of right only * * *, (b) in cases involving a question arising under the Constitution of the United States or of this State, * * *. Subject to law hereafter enacted, the Supreme Court has authority to provide by rule for appeal in other cases from the circuit courts directly to the Supreme Court.

"Appeals from the Appellate Court shall lie to the Supreme Court as a matter of right only (a) in cases in which a question under the Constitution of the United States or of this State arises for the first time in and as a result of the action of the Appellate Court, and (b) upon the certification by a division of the Appellate Court that a case decided by it involves a question of such importance that it should be decided by the Supreme Court. Subject to rules, appeals from the Appellate Court in all other cases shall be by leave of the Supreme Court."

Article VI, Section 7

P. 18

"In all cases, other than those appealable directly to the Supreme Court, appeals from final judgments of a Circuit Court lie as a matter of right to the Appellate Court in the district in which the Circuit Court is located, * * *. The Supreme Court shall provide by rule for expeditious and inexpensive appeals. The Appellate Court may exercise such original jurisdiction as may be necessary to the complete determination of any cause on review * * *, * * *."

Article VI, Section 9

P. 18

"The Circuit Court shall have unlimited original jurisdiction of all justiciable matters, * * *."

Illinois Statutes

1 Ill. Rev. Stat. 1969

Chapter 37—Courts

Section 35

P. 1547

"The said appellate courts respectively, may issue the writ of mandamus to cause a proper record to be duly certified, or made and certified, or to cause any other act to be done which may be necessary to enforce the due administration of justice in all matters, suits or proceedings, which could or might by appeal or writ of error or in any other lawful manner, be brought within their respective jurisdictions; upon petition filed, the clerk of the proper court shall issue summons, and like proceedings shall be had as in other cases of mandamum. • • • • • • •"

2 Ill. Rev. Stat. 1969

Chapter 87—Mandamus

Section 8

P. 571

"The death, resignation or removal from office, by lapse of time or otherwise, of any defendant, shall not have the effect to abate the suit, but his successor may be made a party thereto, and any peremptory writ may be directed against him."

Section 9

P. 571

"The proceedings for a writ of mandamus shall not be dismissed nor the writ denied because the petitioner may have another specific legal remedy, where such writ will afford a proper and sufficient remedy; and amendments may be allowed as in other civil suits."

Section 10

P. 571

"Appeals may be taken in the same manner, upon the same terms, and with like effect as in other civil cases."

Section 11

P. 571

"The provisions of the Civil Practice Act, including the provisions for appeal • • • and the rules • • • shall apply to all proceedings hereunder, except as otherwise provided in this Act."

Illinois Supreme Court Rules

2 Ill. Rev. Stat. 1969

Rule 301

P. 1685

"Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. • • •. • • •. • • •."

Rule 302(d)

P. 1685

"After the filing of the notice of appeal to the Appellate Court in a case of extraordinary importance where immediate decision is necessary, the Supreme Court or a judge thereof may order that the appeal be taken directly to it. • • •."

Rule 315(a)

P. 1689

"A petition for leave to appeal to the Supreme Court from the Appellate Court may be filed in any case not appealable from the Appellate Court as a matter of right. Whether such a petition will be granted is a matter of sound judicial discretion. • • •."